UNITED STATES DISTRICT COURT
FOR THE EASTER DISTRICT OF MICHIGAN
SOUTHERN DIVISION

PROSPECT STREET ENERGY, LLC and
PROSPECT STREET VENTURES I, LLC,

Plaintiffs,

Case No. 16-cv-11376
Hon. Gershwin A. Drain

v

DART ENERGY CORPORATION,
EVEREST ENERGY MANAGEMENT, LLC,
ENERGY GROUP MANAGEMENT, LLC,
EE GROUP, LLC and EVEREST ENERGY
GROUP, LLC,

Defendants.

DEFENDANT ENERGY GROUP MANAGEMENT, LLC'S RESPONSE AND BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE[1]

I. Issue Presented

Where there was at the time Plaintiffs filed this duplicative action a prior pending case between the parties involving the exact same subject matter as this case, should this case be dismissed in favor of the first filed action, and Plaintiffs' Motion to Consolidate be denied?

II. Controlling Authority

Certified Restoration Dry Cleaning vs. Tenke Corp., 511 F.3d 535, 551 (6th Cir. 2007)

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[1] The Motion to Consolidate has been set for hearing on June 27, 2016 at 11:00 a.m. Set for hearing that same date is a Motion to Dismiss (Doc. #18) this improperly filed action, which should moot this Motion to Consolidate altogether.

Innovation Ventures, L.L.C. vs. Custom Nutrition Laboratories, L.L.C., 534 F.Supp.2d 754, 756 (E.D. Mich. 2008)

Zide Sport Shop of Ohio, Inc. vs. Ed Tobergte Associates, Inc., 16 Fed.Appx. 433, 437 (6th Cir. 2001)

III. Introduction

Defendant Energy Group Management, LLC ("EGM")[2] filed a motion to dismiss this improperly filed action on April 29, 2016. That motion is set to be heard by the Court on June 27, 2016 at 10:00 a.m. Dismissal of this improperly filed action will of course moot the motion to "consolidate."

Like the child guilty of double parricide who then pleads for mercy, Plaintiffs complain of multiple actions pending before the Court, when they are the **only** party that filed **anything** in this Court. In a clear case of both forum and judge shopping, Plaintiffs filed successive actions in this Court on April 15, 2016, filed so close in time that they were assigned successive case numbers, 16-cv-11376 and 16-cv-11377. Plaintiffs now have the nerve to turn around and cry foul, arguing for 'consolidation' of the very multiplicity they created. Granting this motion would be tantamount to the Court blessing this wholly improper gamesmanship.

The actual sequence of filing is as follows:

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[2] Apparently believing the Court will not carefully review the pleadings and other papers on file in these actions, Plaintiffs continually lump three distinct entities under the rubric "Everest".

- On April 7, 2016, by 2-1 vote and over a vigorous dissent, an arbitration Panel issued an award in favor of Plaintiffs and against the Defendants, jointly and severally.

- On April 11, 2016, EGM and others filed an action in the Circuit Court for St. Clair County to vacate the arbitration award. An Amended Complaint to Vacate was filed on April 13, 2016.

- On April 15, 2016, Plaintiffs, fully aware of – and in possession of – the prior pending action to vacate the award, filed this action in this Court. When they did so, they inexcusably failed to note in their papers that there was already a pending action to vacate the award. The matter was assigned case no. 16-cv-11376 and assigned to the Honorable John Murphy III, and subsequently reassigned to this Court.

- As proof positive that Plaintiffs were fully aware of – and in possession of – the first filed action to vacate the award, Plaintiffs filed within seconds of the filing of this case, a Notice of Removal of that first filed action. **The removal action was filed so soon following the filing of this action that it was assigned the next successive case number, 16-cv-11377.**

- All Defendants have moved to dismiss this case based on settled law regarding which case is to be considered the "first-filed action" – namely the case commenced by EGM and others on April 11, 2016.[3]

IV. Statement of Pertinent Facts

EGM is a Michigan Limited Liability Company formed in 2007. As surreal as it may sound, EGM finds itself subject to a 2-1 arbitration award in excess of

[3] Defendant Dart had filed a motion to intervene in the first filed action filed on April 11. Plaintiffs removed the case before that motion could be heard, and Dart has renewed that motion in this Court, set for hearing on June 20, 2016, in case 16-cv-11377. A second state court action was commenced by Defendant Dart and later removed to this Court, assigned case number 16-cv-11590. EGM takes no position regarding the proper disposition of that case.

$27,000,000 for alleged violation of a "joint venture" alleged to have been created in 2003 among other parties, four (4) years before EGM even came into existence.

Moreover, **the 2003 agreement contains no agreement to arbitrate, period.** Yet under the guise of a later agreement between the parties - which provides only for arbitration of "disputes arising out of this Agreement" – a 2-1 panel majority found that **one** of the parties to the original 2003 agreement, which contains no arbitration clause, breached that agreement, and moreover, all of the Defendants in this case are to held jointly and severally liable for breach of that 2003 agreement. This legal impossibility – and the consequent clear defects in the 2-1 award - will be fully addressed in EGM's to-be filed motion to vacate, modify or correct the award. Under applicable law, EGM's motion must be filed within three (3) months of issuance of the award, being July 7, 2016.[4]

V. Argument

In a clear case of procedural gamesmanship and forum shopping, the claimants in the arbitration have now created a multiplicity of actions arising out of the issuance of the award. And then to compound their gamesmanship, they have filed a motion to consolidate that which they created, and not under the first filed action, but under the second filed action. The motion, if not mooted by the pending motions to dismiss, should be denied.

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[4] And this Court agreed in entering an Order to that effect, Doc. #38.

EGM does not dispute the notion that the proceedings to vacate this rogue and clearly improper arbitration award should take place in a singular proceeding. But the answer is not "consolidation" – the answer is dismissal of this improperly filed duplicative case. Dismissal will leave all the parties in a singular case, case no. 16-cv-11377, to litigate the to-be filed motions to vacate.

As previously briefed to the Court in the pending motions to dismiss this case, it is well settled that, out of a matter of comity and respect, courts should give way to prior filed actions involving the same parties and subject matter. This doctrine has been consistently applied in this Circuit. See, e.g., *Certified Restoration Dry Cleaning vs. Tenke Corp*., 511 F.3d 535, 551 (6th Cir. 2007); *Zide Sport Shop of Ohio, Inc. vs. Ed Tobergte Associates, Inc.*, 16 Fed.Appx. 433, 437 (6th Cir. 2001).

The first filed action in this saga was originally assigned to the Honorable Bernard Friedman, having been removed from state court to that Court, and subsequently reassigned to this Court. The fact that it was initiated in state court does not change the fact that it is considered the first filed action for these purposes. **It is the date of the state court filing that controls.** *Innovation Ventures, L.L.C. vs. Custom Nutrition Laboratories, L.L.C.*, 534 F.Supp.2d 754, 756 (E.D. Mich. 2008).

Plaintiffs should not be permitted to play these procedural games by having this duplicative action on file – an action filed after they were aware of and had possession of the first filed action. **Moreover, they have filed a Counter-Complaint in that first filed action which is word for word the same as the Complaint filed in this case**. Thus once again, the first filed case, case no. 16-cv-11377, is the case in which all issues should proceed.

Plaintiffs' facetious citation to local rule 42.1 cannot be taken seriously without the Court endorsing Plaintiffs' gamesmanship. The rule was designed to prevent – not encourage – Judge shopping. Allowing Plaintiffs to file and then pursue this improper case – rather than remove the first filed action and file their compulsory counterclaims – which they have now done - would be to turn the purpose of L.R. 42.1 on its head.

VI. Conclusion

On April 11, 2016, an action to vacate the subject arbitration award was filed in state court. That is the first filed action. That action was subsequently removed to this Court, and Plaintiffs have filed a Counter-Complaint seeking confirmation of the clearly improper award.

That first filed action bears case number 16-cv-11377. That is one and only action that is properly before this Court. This case (16-cv-11376) should be dismissed and Plaintiffs' motion to consolidate should be denied.

Respectfully submitted,

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DATED: May 27, 2016

Attorneys for Defendant Energy Group Management, LLC
P31680

CERTIFICATE OF SERVICE

I hereby certify that on May 27, 2016, I electronically filed the foregoing document with the Clerk of the Court using the ECF system which will send notification of such filing to all counsel of record.

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